Supreme Court, U.S.
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No. 99-58

In The

Supreme Court of the United States

October Term, 1999

JACK HAWKINS, individually and as President of the Denver Area Labor Federation and PETE VRIESENGA, individually and as President of Denver Musicians Association,

Petitioners,

vs.

CITY AND COUNTY OF DENVER, GARY LANE, Director of the Denver Theaters and Arenas, BROOK NICHOLS, Assistant Building Manager of the Denver Theaters and Arenas and DAVID MICHAUD, as Chief of the Denver Police Department,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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Jack Hawkins and Pete Vriesenga respectfully submit a Reply to Respondents' Brief in Opposition dated September 3, 1999.

I. THERE IS AN UNDISPUTED CONFLICT WITHIN THE CIRCUITS

In their Brief in Opposition, Respondents do not deny that the decision below squarely conflicts with this Court's decision in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), as well as with decisions in the First, Second, Seventh, and Ninth Circuits regarding the application of the First Amendment to the distribution of leaflets in public areas like Denver's Galleria. See *Jews for Jesus, Inc., v. Massachussetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993) (absolute ban on leafletting in Boston subway stations struck down); *Paulsen v. County of Nassau*, 925 F.2d 65 (2nd Cir. 1991) (affirming injuction allowing leafletting in the Nassau County Coliseum); *Chicago ACORN v. Metropolitan Pier and Exposition Authority.*, 150 F.3d 695 (7th Cir. 1998) (upholding right to distribute leaflets within Chicago's Navy Pier); *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir.), *cert. denied*, 510 U.S. 915 (1993) (ban on leafletting in Olvera Street (Los Angeles) pedestrian mall struck down). Review by this Court is required in order to resolve this conflict and the resulting serious doctrinal confusion.

II. THE ADMITTED EXTENT OF THE ACCESS DENIAL EVIDENCES THE BAN'S UNCONSTITUTIONALITY

The Brief in Opposition confirms that Denver's leafletting ban results in Petitioners being prevented from communicating their protest of the Ballet's decision to use recorded rather than live music to at least one half of the Ballet's patrons. Thus, Respondents concede that only "forty or fifty percent of DPAC patrons enter the DPAC via those sidewalks" (on which Petitioners are permitted to leaflet). Brief in Opposition, p. 4. The remainder enter through a parking garage and the Galleria, in which leafletting is completely prohibited, and never traverse the sidewalks on which leafletting may take place. *Id.* at 1-2.

A policy that arbitrarily deprives Petitioners of the opportunity to communicate with at least half of their audience must be subjected to the strictest constitutional scrutiny, not the minimal scrutiny, i.e. "***could have conceivably*** run afoul of the City's interests," afforded by the court below. Pet. App. 17a (emphasis added).

III. PHOTOS ATTACHED TO RESPONDENTS' BRIEF ARE NOT REFLECTIVE OF GALLERIA

The only justification offered by the Brief in Opposition for Respondents' absolute ban on leafletting within the Galleria is that the Galleria is crowded before performances and during intermissions and is the only evacuation route in the event of an emergency. Brief in Opposition, p. 9. In support of its "crowding" argument, the Brief appends two photographs that allegedly "accurately depict the congestion in the Galleria during performance intermission." *Id.* at 3. These photographs reproduced at Resp. App. 1 and 2 were taken during the day within the Galleria during the summer Seven Performing Arts Festival, when all of the Galleria's venues were in use. Trial Court Transcript of Hearing (December 3, 1997), p. 46, lines 13-16 (testimony of Rodney Smith, General Manager of the DPAC). These photographs plainly ***do not*** "accurately depict" the traffic within the Galleria before, during or after a typical Ballet performance, when the Galleria is in the uncongested state shown in the photographs reproduced at pp. 55a and 57a of Petitioners' Appendix.

The important point in this regard is that Denver has imposed an ***absolute ban*** on leafletting within the Galleria. This ban applies regardless of whether or not the Galleria is congested. Petitioners agree that Denver is free to impose reasonable time, place, and manner regulations on leafletting within the Galleria that limit the number of leafletters. For example, Denver might require that Petitioners avoid standing in especially narrow passageways, might perhaps require leafletting to be related to Galleria events, or even completely ban leafletting at highly congested times or during emergencies. A total ban on Galleria leafletting ***at all times*** because the Galleria

may be unusually crowded ***at one or two times during the year*** is, however, a clearly unreasonable interference with the Petitioners' First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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